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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1477

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS,
EASTERN DIVISION

FAST MOTOR SERVICE, INC.,
Appellant,
vs
THE UNITED STATES OF AMERICA
and
THE INTERSTATE COMMERCE COMMISSION,
Appellees.
and
ASSOCIATED TRUCK LINES, INC., ET AL.,
Intervenors-Appellees.

MOTION TO AFFIRM

JOHN W. BRYANT
REX EAMES

of the firm of
EAMES, PETRILLO AND WILCOX
900 Guardian Building
Detroit, Michigan 48226
Telephone: (313) 963-3750
Attorneys for
Intervenors-Appellees

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
962-8745—962-8732

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MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, Associated Truck Lines, Inc., Jones Transfer Company and Key Line Freight, Inc., move that the judgment of the District Court be affirmed.

STATEMENT OF THE CASE

This is a direct appeal from the final judgment of a statutory three-judge District Court affirming the decision of the Interstate Commerce Commission in its Docket No. MC-126276 (Sub No. 46). The agency proceeding below involved an application by Fast Motor Service, Inc., the appellant herein, for a permit as a contract carrier, by motor vehicle, of containers and other named commodities between points in 23 states, under contract with Continental Can Company, Inc. The appellant and its supporting shipper, Continental Can, presented evidence in support of the application at an oral hearing before a Hearing Examiner, and 22 protesting motor carriers presented evidence in opposition. The Hearing Examiner issued a Report and Order denying the application, and this Report and Order has been sustained on appeal within the Commission and by the District Court.

At hearing, applicant and its supporting shipper sought to demonstrate that the appellant was better equipped to meet the distinct needs of the shipper than were the protestant carriers. The principal argument advanced by the appellant and the shipper was that appellant proposed to serve the shipper with motor vehicle van equipment of greater than normal height and cubic capacity to handle certain of shipper's light and bulky containers. However, although over 80 Continental Can facilities were involved in this application, the shipper did not project either the number of loads to be tendered to appellant at any one of these facilities or the volume of traffic from any facility which required high cubic capacity equipment. According to the shipper, appellant's service was also desired because of appellant's dedication of particular units to the shipper's traffic, appellant's availability to provide a service

at various unnamed locations at seasonal peaks, appellant's willingness to provide multiple pick ups, and appellant's willingness to spot equipment for loading at various plant or warehouse locations.

Twenty-two carriers appeared in opposition to the granting of the sought authority. Many of these carriers were providing service to the shipper at various of its facilities, and many of these carriers operated the high cubic capacity equipment described by the appellant and the shipper.

In reviewing the testimony of the supporting shipper, the Hearing Examiner noted that the extra high cubic capacity equipment requested by the shipper was specifically required only under certain situations. Extra high cubic capacity equipment is of no advantage in the movement of many of the commodities produced by the shipper and even within particular categories of containers, the need for added trailer height varies depending upon the height of the individual container. Moreover, the Examiner found that not all customers order in sufficient quantities nor do all receivers desire sufficient aggregation to utilize maximum capacity of an extra high cubic capacity van. (Jurisdictional Statement, p. 9A, 10A).

Under the terms of Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), 309(b), the Examiner's Report and Order found that appellant's proposed service constituted contract carriage under Section 203(a)(15) and that the appellant would be serving a permissible number of shippers under the first criteria of Section 209(b). However, in evaluating the second Section 209(b) criteria, the nature of the service proposed, the Examiner found that the available evidence overwhelmingly failed to support issuance of a permit to appellant. The Examiner stated that while appellant proposed to provide high cubic capacity to the shipper at un-

stated locations, protestants were rendering extensive service to the shipper at many locations, largely without complaint, and in many instances, were providing high cubic capacity equipment. Also, the Examiner noted that high cubic capacity vans were beneficial to the shipper only for transporting certain size loads of certain commodities but that the number of such shipments requiring high cubic capacity equipment was never delineated for any particular plant location. Under such circumstances, the Examiner found there was no way of determining whether appellant's proposed service was actually better tailored to meet the shipper's requirements than the collective services of the protestants already available at many of the shipper's facilities. (Jurisdictional Statement, p. 29A, 30A)

The Hearing Examiner also found that appellant had failed to establish its financial or operational ability to provide the requested service to the shipper. Under the other criteria of Section 209(b), the Examiner found that denial of the application would not adversely affect either appellant or the shipper but that a grant of the permit and diversion of traffic could adversely affect the traffic patterns of the protestants. The Examiner also found that the changing character of the shipper's requirements did not significantly favor a granting of the permit.

The Commission affirmed and adopted the Hearing Examiner's Report in two succeeding Orders, and this affirmance was sustained by the majority opinion of the District Court. While declining to fully reweigh the criteria considered by the Commission, the Court stated that certain of the protestants were better equipped and stronger financially than appellant and that protestants could fulfill the specialized needs of the supporting shipper, including the furnishing of high cubic capacity equipment.

The Court sustained the Hearing Examiner's conclusion that appellant had failed to demonstrate that it was better equipped to meet the shipper's needs for high cubic capacity equipment than the protestants, by virtue of its failure to adduce evidence as to the extent of such needs at any particular plant location of the shipper. (See Jurisdictional Statement, p. 44A, 45A)

ARGUMENT

The majority opinion of the District Court below was entirely proper in affirming the action of the Interstate Commerce Commission in this matter. Essentially, these appeal proceedings involve little more than an attempt by appellant to force a reweighing of the evidence considered by the Commission. In this situation, substantial evidence clearly existed to support the findings of the Commission's Hearing Examiner.

The central feature of appellant's application was the shipper's desire for high cubic capacity van equipment and the promise of the appellant to provide such equipment. However, based on the underlying record, the Examiner found that a number of the protestants serving many of the shipper's facilities were also able to provide the services desired by the shipper. Furthermore, the Judge noted that many items produced at many of the shipper's facilities did not, in fact, require high cubic capacity equipment for transportation. Under these circumstances, it clearly was incumbent on the appellant and the shipper to state the projected volumes of traffic requiring high cubic capacity equipment moving from each of the shipper's plants and to state the projected need for appellant's service at such facilities. Without such information, the Examiner had no way of determining whether appellant's proposed service was better suited

quantitively or qualitatively to meet the shipper's needs, when similar services were available from protestants at many of the plants involved in the application below. There is little question that such findings are supported by substantial evidence and were properly affirmed by the District Court. Compare *United States* v *Pierce Auto Freight Lines, Inc.*, 327 U.S. 515, 536; *Mississippi Valley Barge Line Co.* v *United States*, 292 U.S. 283, 286-87 (1934).

There is no merit to appellant's contention that the decisions of the District Court and the Commission below are in any way based on presumptions in favor of protestants or are contrary to principles expressed in *I.C.C.* v *J. T. Transport Co.*, 368 U.S. 81 (1961). After reviewing the appellant's service proposal and finding that protestants had the ability to meet the specialized needs described, the Hearing Examiner and the reviewing Court each properly concluded that appellant had the burden of demonstrating that it was better equipped to meet the shipper's needs than the protestants. Compare *I.C.C.* v *J. T. Transport Co.*, 368 U.S. at 90. Many of the protestants before the Commission, including two of the movants herein, were handling traffic for the shipper at the time of the hearing, and the Hearing Examiner clearly did not engage in any presumption in his limited finding that protestants could be adversely affected by a grant of the permit to appellant. Similarly, there is no merit to the argument that the Commission has improperly ignored the issue of emergency or peak period transportation. Such services were expressly noted by the Hearing Examiner and found to be generally available from the protestant carriers. (Jurisdictional Statement, p. 10A, 45A) Appellant's arguments in these areas all seek a reweighing of various evidentiary factors which were fully considered

by the Commission. The reviewing Court below properly noted that courts should not attempt to reweigh such evidence on review. Compare *Midwest Emery Freight System, Inc.* v *U.S.*, 293 F. Supp. 403 (N.D. Ill., 1968); *Merchants Warehouse Company* v *U.S.*, 283 U.S. 501, 508 (1931).

Contrary to appellant's contention, the Commission has in no way acted arbitrarily or inconsistently in denying the application below. The two earlier Commission cases[1] cited by applicants are readily distinguishable from the instant proceeding in that they involved only one or two shipping origins as opposed to the over 80 plants involved herein and involved specific evidence as to the inability of protestant carriers to provide the desired service at the particular locations. It is in no way inconsistent for the Commission to have granted the applications in the two cited proceedings and to have denied the application involved in this appeal.

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[1] *Umthun Trucking Co., Extension—Seven States*, 112 M.C.C. 860 (1971); *Fleet Transport, Inc., Extension—Orthodichlorobenze*, 112 M.C.C. 732 (1971), aff'd sub nom *Chemical Leaman Tank Lines, Inc.* v *United States*, 324 F. Supp. 104 (D. Del., 1972).

CONCLUSION

The District Court's decision is clearly correct, and no substantial question is presented by this appeal. Accordingly, the judgment of the District Court should be affirmed.

Respectfully submitted,

JOHN W. BRYANT
REX EAMES
of the firm of
EAMES, PETRILLO AND WILCOX
900 Guardian Building
Detroit, Michigan 48226
Telephone: (313) 963-3750
Attorneys for Intervenors-
Appellees

CERTIFICATE OF SERVICE

I, John W. Bryant, counsel for Intervenors-Appellees herein and a member of the Bar of the Supreme Court

of the United States, hereby certify that, on the 9th day of July, 1975, I served three copies of the foregoing document upon the parties hereto, postage prepaid, to the following:

Honorable Robert H. Bork
Solicitor General
Department of Justice
Washington, D. C. 20530

John H. D. Wigger, Esq.
Department of Justice
Room 3410
Washington, D. C. 20530

H. Gordon Homme, Jr., Esq.
Interstate Commerce Commission
Washington, D. C. 20423

Daniel Sullivan, Esq.
327 South LaSalle Street
Chicago, Illinois 60604

James R. Thompson, Esq.
U. S. Attorney
219 South Dearborn Street
Chicago, Illinois 60604

Donald Levine, Esq.
39 South LaSalle Street
Chicago, Illinois 60603

James C. Hardman, Esq.
33 North LaSalle Street
Chicago, Illinois 60602

Christian V. Graf, Esq.
407 North Front Street
Harrisburg, Pennsylvania 17101

John W. Bryant